SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

Christopher Fleming

INDEX NO. 154415/2016

MOT. DATE

- v -

MOT. SEQ. NO. 004

173 Broadway Associates, LLC et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

This is a personal injury action. Defendants 173 Broadway Associates, LLC ("173 Broadway") and SDG Management Corp. ("SDG") move for summary judgment dismissing plaintiff's complaint against them. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is granted.

Plaintiff, a police officer, was allegedly injured on April 9, 2016 while executing a search warrant at 4099 Broadway, New York, New York (the "premises"). The search warrant was issued in connection with suspected illegal gambling occurring on the first floor of the premises where a bodega was operated. Specifically, plaintiff claims that he was injured while standing on a makeshift staircase that led to a door five feet above the store inside the premises. At that time, plaintiff was using a battering ram to breach the door. Plaintiff testified at his deposition that he was injured because he felt the staircase move and flex, causing him to feel pain in his left knee. Plaintiff further explained that "the torque and trying to balance" himself caused him to sustain his injuries. Plaintiff also testified that because there was no handrail on the makeshift staircase, he had difficulty bracing himself while he was using the battering ram.

Defendants are 173 Broadway, the owner, and SDG, which managed the building. On the date of plaintiff's accident, 173 Broadway had a lease agreement with third-party defendant Camilo Fernandez who in turn allegedly operated a bodega at stores #7 and 8 on the first floor of the premises where the search warrant was being executed. At his deposition, Fernandez testified that the makeshift steps and door were present at the premises when he first signed the lease to operate the bodega in 1994. Fernandez claimed that he repaired a step on the staircase in or about 1994. He never made any complaints about the staircase to the landlord and did not know who installed or constructed the stairs.

Dated: 8/17/22

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Fernandez further testified that in April 2016, Carlos Cabral operated the bodega after Fernandez "transfer[red] the deed over to [Cabral] ... [m]aybe two or three months before that." Fernandez later clarified that he meant "lease" when he previously referred to the deed. Fernandez further testified that he notified the landlord of the assignment who "gave [Cabral] the extension for him to continue with the lease because it was a corporation." A copy of 173 Broadway's lease with Fernandez has been provided to the court.

In his complaint, plaintiff asserts four causes of action: [1] RPL §231; [2] two causes of action for negligence; and [3] GML §205-e.

Defendants argue that they are entitled to summary judgment because 173 Broadway was an out-of-possession landlord and further, that the defendants did not breach any duty to plaintiff. Movants have submitted the sworn affidavit of Noey Matos, property manager for SDG, who represents that neither defendant controlled or supervised the bodega, that Fernandez was responsible for taking good care of the premises, including the fixtures and appurtenances therein, and that the owner was only required to maintain and repair the public portions of the building, which did not include the makeshift staircase where plaintiff's accident occurred. At his deposition, Matos testified that he was unaware of any criminal activity being conducted on the subject premises, at any point, prior to the date of the plaintiff's accident when the search warrant was executed.

In opposition, plaintiff argues that there is an issue of fact as to whether the underlying lease agreement "holds Landlord responsible for this very staircase." Plaintiff points to the lease as proof that 173 Broadway was not an out-of-possession landlord, to wit Paragraph 13 and section 46.1 thereof. Paragraph 13 provides in relevant part as follows:

> Owner shall have the right at anytime without the same constituting an eviction and without incurring liability to Tenant therefor to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets and other public parts of the building and to change the name, number of designation by which the building may be known.

Section 46.1 of the lease states:

> Owner shall arrange for and be responsible for all necessary structural repairs to the premises including the roof and structural walls and to the exterior of the premises...

Meanwhile, paragraph 4 of the lease provides:

> Owner shall maintain and repair the public portions of the building, both exterior and interior... Tenant shall ... take good care of the demised premises and the fixtures and appurtenances therein... and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition...

Finally, the lease grants defendants

> the right to enter the demised premises in any emergency at any time, and at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease or for the purpose of complying with laws, regulations and other directions of government authorities.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

"An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it (1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*DeJesus v. Tavares*, 140 AD3d 433 [1st Dept 2016] citing *Vasquez v. The Rector*, 40 AD3d 265 [1st Dept.2007] [internal quotations omitted]).

The lease agreement expressly provided that the tenant Camilo Fernandez was responsible for taking good care of the demised premises, including the fixtures and appurtenances therein, which included the subject makeshift staircase. Landlord only had a limited right of reentry and there is no dispute on this record that Fernandez, and not the landlord, actually maintained the makeshift staircase. Further, the makeshift staircase was not located inside the public portions of the building. No testimony that door led to second floor. There is no dispute that neither the stairway itself nor the area that it led to was a public area of the building. Therefore, plaintiff's attempt to argue that it was the defendants' responsibility to maintain the makeshift staircase where his accident occurred is rejected.

With respect to the absence of a handrail on the staircase, plaintiff offers no proof of code violation or deviation from an architectural standard which would show a deviation. Moreover, the lack of a handrail on the makeshift staircase was not a proximate cause of plaintiff's accident based upon his own version of the accident. Plaintiff's accident was caused due to the torque from using a heavy battering ram trying to break into the door at the top of the staircase while trying to balance himself on said staircase. There is no indication on this record that a handrail would have prevented and/or mitigated plaintiff's accident. Therefore, the absence of a handrail is a red herring. Thus, defendants have demonstrated *prima facie* entitlement to summary judgment dismissing plaintiff's negligence claims.

RPL § 231[2] imputes liability to a landowner which knowingly leases or gives possession of real property to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business. And as the Court of Appeals explained in *Gammons v. City of New York* (24 NY3d 562 [2014]), GML § 205-e "contains a right of action allowing police officers to sue for injuries sustained in the line of duty as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" (internal quotations omitted).

The RPL § 231 claim is severed and dismissed because defendants have demonstrated *prima facie* that there was no basis for them to believe that the premises was being used or occupied for any unlawful purpose. In turn, plaintiff has failed to raise a triable issue of fact on this point. As for the GML § 205-e claim, defendants' motion is also granted. Plaintiff's GML claim is premises upon Administrative

Code § 28-301.1, which defendants maintain "is a general non-specific safety provision and is therefore insufficient to impose liability on [] defendants." Plaintiff disagrees.

Section 28-301.1 provides, in relevant part, as follows:

> All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired shall be maintained in good working condition. . .the owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.

The First Department has held that Section 28-301.1 is "[a] general 'non-specific safety provision'" and "insufficient to impose liability on an out-of-possession owner." The court sees no reason why this provision of the Administrative Code would not be too general to impose liability upon the defendants here. Therefore, plaintiff's GML § 205-e claim must also be dismissed.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED defendants' motion for summary judgment dismissing plaintiff's claims against it is granted in its entirety, plaintiff's complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that on or before October 4, 2022, the parties are directed to submit a letter to the court advising as to the status of the third-party action.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/17/22
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.